No. 96-203

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOYCE B. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's perjury conviction should be reversed for plain error because the trial court resolved the issue of materiality itself rather than submitting it to the jury, when the trial took place before this Court disapproved of that practice in *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), petitioner did not object to it in the district court, and there is no reasonable probability that any rational juror could have found petitioner's false testimony to have been immaterial.

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OPINION BELOW

The opinion of the court of appeals (J.A. 84-88) is unpublished, but the judgment is noted at 82 F.3d 429 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1996. A petition for rehearing was denied on June 11, 1996. Pet. App. 10a-11a. The petition for a writ of certiorari was filed on August 5, 1996, and was granted on November 15, 1996 (117 S. Ct. 451). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Federal Rules of Criminal Procedure 30, 51, and 52 and 18 U.S.C. 1623 are set forth in the appendix to this brief.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of perjury, in violation of 18 U.S.C. 1623. She was sentenced to 30 months' imprisonment, to be followed by three years' supervised release, and was ordered to pay a fine of $30,000. J.A. 75-81. The court of appeals affirmed. J.A. 84-88.

1. Beginning in the 1980s, Earl James Fields and another man netted approximately $10 million from trafficking in illegal drugs. J.A. 85. In 1993, federal investigators and a federal grand jury sought evidence about the nature of Fields' drug distribution and money laundering activities. See J.A. 59-62.

Fields had been involved in a long-term relationship with petitioner and had fathered one of her children. See J.A. 39, 49-50. On March 25, 1993, petitioner was called before the grand jury to testify about whether, and to what extent, she had received money from Fields over the years and had invested it in various real estate holdings. Petitioner, a college graduate, testified that she was employed as a recruitment supervisor for the Florida Department of Health and Rehabilitative Services at an annual salary of approximately $34,000. J.A. 17-18, 85. She acknowledged having heard rumors that Fields was a drug dealer, but denied knowing that he was one. J.A. 47-48. She further acknowledged that she owned five real properties in Jacksonville, Florida, including her house on Moore Street. Petitioner had made extensive

improvements to that property, which increased its appraised value from $75,600 when petitioner bought it in 1991 to $344,800 in 1993. J.A. 85.

Much of petitioner's grand jury testimony focused on the source of her money for those improvements. She testified that she had paid for the improvements with $80,000 to $120,000 in cash that her mother had supposedly received from one Gerald Talcott. Petitioner identified Talcott as an acquaintance from Canada who befriended petitioner's family after her mother had found and returned his lost wallet. J.A. 22-23, 36. Petitioner said that, in 1985 or 1986, Talcott had given a box of money to her mother as a gift, and that her mother had stored that cash in her closet until her death in 1990. J.A. 22-28, 34. At that time, petitioner said, the money became hers. J.A. 27-28. Petitioner testified that she was unsure how much money was in the box, J.A. 25, that she never put the money into a bank but instead kept it in her closet, J.A. 34, and that she had used it all to pay for the improvements to her house, J.A. 36.

2. Petitioner's testimony about the source of funds for her home improvements formed the basis for her perjury indictment, J.A. 6-12, 85, which was issued by the same grand jury to which she had given that testimony. At trial, the prosecution established that Talcott had died in April 1982, several years before the time, according to petitioner (see J.A. 22, 25), that Talcott had given her mother between $80,000 and $120,000 in cash. In his will, Talcott had left nothing to petitioner or her mother; instead, he left $2,000 to a friend, a blacksmith's anvil to another friend, a lawn swing to his cousin, and the remainder of his estate to six designated charitable organizations. 1 Tr. 251, 255-256; Gov't Exh. 5. Moreover, petitioner's sister

testified that she had lived next door to their mother until her death, had seen her daily, and yet knew nothing about the putative cash hoard. 2 Tr. 9-11.

3. At the close of trial, petitioner and the prosecution each proposed the standard Eleventh Circuit pattern jury instruction on materiality, an element of perjury under 18 U.S.C. 1623(a).[1] J.A. 67-70; see generally *Kungys* v. *United States*, 485 U.S. 759, 770 (1988) ("[A] concealment or misrepresentation is material if it has a natural tendency to influence, or was capable of influencing, the decision of the decision-making body to which it was addressed.") (internal quotation marks omitted). The district court agreed to that joint request and gave the following instruction:

> The materiality of the matter involved in the alleged false testimony is not a matter with which you are concerned, but, rather, it is a question for the Court to decide. You are instructed that the questions asked the defendant, as alleged, constituted material matters in the grand jury proceedings referred to in the indictment.

J.A. 72. Petitioner did not object to that instruction. 3 Tr. 137. Nor did she ever seek a jury determination on the materiality issue. In fact, when the government had elicited trial testimony from the grand jury foreman on the nature of the grand jury's investigation, petitioner's counsel had unsuccessfully objected: "Your honor, this is an improper matter for the jury. It goes to materiality and that's a matter for the Court, and I object." J.A. 61.

[1] Section 1623(a) of Title 18 provides in pertinent part:

> Whoever under oath * * * in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration * * * shall be fined under this title or imprisoned not more than five years, or both.

After receiving the parties' proposed instructions, but before instructing the jury (see J.A. 2-3, 63), the district court conducted a hearing on, among other issues, the materiality of petitioner's testimony about her source of money for the home improvements. See J.A. 65-66. At the hearing, petitioner's counsel confined his discussion of that issue to a single sentence: "I would argue that the element of materiality has been insufficiently proven and that the Court ought to grant a judgment of acquittal." 2A Tr. 109. Petitioner presented no argument or evidence to support that assertion.

On reviewing the record, the district court determined that petitioner's testimony had been material to the grand jury's inquiry. See J.A. 65-66. The court based that determination on unchallenged evidence that the grand jury had been investigating the "alleged distribution of cocaine and marijuana by Mr. Fields and the disposition of the money which was the proceeds of that business, including the possible concealment of the proceeds as investments in real estate." *Ibid.*; accord J.A. 5-6 (indictment of Johnson, issued by same grand jury that had been investigating Fields); J.A. 59-60 (testimony of federal agent assigned to Fields investigation), 60-62 (testimony of grand jury foreman). The district court concluded that the subject of the relevant portion of petitioner's testimony—the source of her money to "purchase the home or to reconstruct the home"—therefore "would be within the purview of information that the grand jury may have been looking at in order to continue

their investigation or conduct their investigation on Mr. Fields." J.A. 66.

On December 9, 1994, the jury found petitioner guilty of perjury. In reaching that verdict, the jury found beyond a reasonable doubt that petitioner had "knowingly" and "willfully" given "false testimony" to the grand jury while "under oath." J.A. 72-74 (jury instructions).

4. After petitioner's conviction, this Court held in *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), that the Fifth and Sixth Amendments require the submission of the materiality issue to the jury when materiality is an element of a charged offense. On appeal, petitioner contended that her conviction should be reversed because the district court had decided the materiality question itself. The court of appeals agreed with petitioner that, under *Gaudin*, the district court had committed error. J.A. 86-87. Because petitioner had not objected to that error at trial, however, the court of appeals (see J.A. 87) reviewed the court's action for plain error under Federal Rule of Criminal Procedure 52(b), which states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

In conducting that review, the court of appeals assumed, without deciding, that the district court's error had been "plain" within the meaning of Rule 52(b). J.A. 87; see generally *United States* v. *Olano*, 507 U.S. 725, 734 (1993). The court held, however, that the error had not affected petitioner's "substantial rights," and therefore did not require reversal under Rule 52(b), in light of the "overwhelming evidence"

that her false claims were material. The court explained:

> The focus of the grand jury's investigation was the whereabouts of the proceeds from Fields' drug trafficking activities. There was substantial evidence that [petitioner], and specifically her house, was one of the avenues through which Fields laundered that money. No reasonable juror could conclude that [petitioner's] false statements about the source of the money used to purchase and renovate her house were not material to the grand jury's investigation.

J.A. 88.

SUMMARY OF ARGUMENT

I. In *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), which was decided after the trial in this case, this Court made clear that it is error for a district court to decide the element of materiality itself instead of submitting it to the jury. Nonetheless, "[n]o procedural principle is more familiar to this Court than that a constitutional right * * * may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *United States* v. *Olano*, 507 U.S. 725, 731 (1993). Here, petitioner forfeited her *Gaudin* claim by failing to raise it at trial. See Fed. R. Crim. P. 30, 51. The only provision for appellate review of that claim is therefore Rule 52(b) of the Federal Rules of Criminal Procedure, which prescribes the "plain error" inquiry that governs this case. Petitioner's contrary argument—which would exempt defendants from the need to satisfy the Rule 52(b) standard in cases where a "solid

wall" of precedent would have defeated an objection at trial or where an error is deemed "structural"—is inconsistent with the text and purposes of the Federal Rules.

II. Application of Rule 52(b) in this case requires affirmance of petitioner's conviction for two independent reasons. First, by its terms, that provision entitles a defendant to relief only when the error in question was "plain" at the time of both trial and appeal. "[R]ecourse may be had to [Rule 52(b)] only on appeal from a trial infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States* v. *Frady*, 456 U.S. 152, 163 (1982). The disposition of the materiality issue by the court rather than the jury, which was accepted practice in 11 of the 12 regional courts of appeals at the time of trial, does not meet that threshold requirement.

Second, even if relief were sometimes available in cases where a forfeited error becomes "plain" only at the time of appeal, the *Gaudin* error in this case would not warrant the exercise of appellate remedial discretion. As an initial matter, *Gaudin* error is not "structural" error, but trial error that is subject to case-by-case review to determine whether it affected "substantial rights." But even if the *Gaudin* error in this case could be said to have affected petitioner's "substantial rights" despite the overwhelming evidence against her on the materiality issue, reversal of her conviction is appropriate only if the error also "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736.

The error in this case has no such effect. There is no reasonable probability that a trial free from *Gaudin* error would have led to a different result; the error, in other words, does not "undermine[] confidence in the outcome of the trial." Cf. *Kyles* v. *Whitley*, 115 S. Ct. 1555, 1565-1566 (1995). And there is nothing about the character of the error itself that justifies reversal in the absence of a showing that the error might have affected the outcome of a given case. For more than five decades, courts adhered almost universally to the approach followed by the district court in this case, resulting in thousands of perjury convictions in which the issue of materiality was resolved by the court. A practice that widespread and that rarely questioned is not so unfair that affirmance of such convictions would threaten the reputation of the courts. Indeed, to reverse a conviction based on an error that was not identified as such until after trial, and that had no reasonable probability of affecting the result in a particular case, would itself undermine "the fairness, integrity [and] public reputation" of the criminal justice system. See *Olano*, 507 U.S. at 736.

ARGUMENT

I. RULE 52(b) PRESCRIBES THE EXCLUSIVE STANDARD FOR REVIEWING ERRORS TO WHICH A DEFENDANT DID NOT OBJECT AT TRIAL

1. In *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), this Court held that the issue of materiality, like other elements of a criminal offense, must be submitted to a jury in a prosecution brought under 18 U.S.C. 1001, which prohibits false statements in a matter within the jurisdiction of a federal agency.

That holding also governs prosecutions brought under 18 U.S.C. 1623(a), the federal perjury statute at issue here. Under both Section 1001 and Section 1623(a), the materiality element typically presents a "mixed question of law and fact," a form of inquiry that this Court has deemed "peculiarly on[e] for the trier of fact." *Gaudin*, 115 S. Ct. at 2314-2315.[2] We therefore agree with petitioner that the district court erred in deciding the materiality question itself rather than submitting it to the jury.

The issue presented in this case is not, however, whether the district court erred, but whether that error requires the reversal of petitioner's conviction even though she did not preserve her objection to that error at trial.[3] "'No procedural principle is more

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[2] In contrast, some criminal statutes present materiality questions that must be resolved purely as a matter of logic or statutory definition. See, *e.g.*, *United States* v. *Klais*, 68 F.3d 1282 (11th Cir. 1995) (prosecution for false statements "with respect to any fact material to the lawfulness of [a firearm] sale," 18 U.S.C. 922(a)(6)), cert. denied, 117 S. Ct. 94 (1996); *United States* v. *Klausner*, 80 F.3d 55, 61 (2d Cir. 1996) (prosecution for preparing a tax return that is false as to a material matter under 26 U.S.C. 7206(2)). This case does not present any issue concerning whether it would be error for a district court to decide such questions as a matter of law. Compare *Klausner*, 80 F.3d at 61 (finding no error), with *United States* v. *DiRico*, 78 F.3d 732, 736 (1st Cir. 1996) (finding error).

[3] Petitioner's counsel not only requested the very instruction that informed the jury that the materiality question had been decided against petitioner, see J.A. 69-70, but objected to the presentation of any materiality evidence to the jury on the ground that materiality was "a matter for the Court" and "an improper matter for the jury," J.A. 61. Petitioner's claim might therefore be barred by the doctrine that a defendant who "invites" an error at trial may not then cite that error as a basis for reversal. See *United States* v. *Muskovsky*, 863 F.2d 1319, 1329 (7th Cir. 1988), cert. denied, 489 U.S. 1067 (1989). The court of appeals, however, did not reach that issue. J.A. 86 n.1. Moreover, because petitioner's *Gaudin* claim fails under plain-error analysis and because the government did not previously argue that petitioner "waived" her right to a jury determination of the materiality issue, this Court should resolve the case on the premise that petitioner merely "forfeited," rather than "waived," her right to a jury trial on that issue. See *United States* v. *Olano*, 507 U.S. 725, 733 (1993) (explaining that "waiver," as opposed to forfeiture, extinguishes a claim of "error").

familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States* v. *Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)); see also *United States* v. *Frady*, 456 U.S. 152, 162-163 (1982); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239 (1940); cf. *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 363 (1963) (rejecting forfeited claim of grand jury discrimination in absence of timely objection at trial). Here, because petitioner did not object to the *Gaudin* error at trial, the only source for appellate review of her *Gaudin* claim is Federal Rule of Criminal Procedure 52(b), which provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." See *Olano*, 507 U.S. at 732-737 (describing "plain error" inquiry).

Citing recent Ninth Circuit precedent, petitioner suggests that Rule 52(b) is inapplicable, and that the more lenient "harmless error" standards of Rule 52(a) should govern instead, where a "'solid wall' of

binding authority" would have made any objection futile at the time of trial. Pet. Br. 25 (quoting *United States* v. *Keys*, 95 F.3d 874, 879 (9th Cir. 1996) (en banc), petition for cert. pending, No. 96-1089 (filed Jan. 9, 1997)). That position is inconsistent with the text and underlying purposes of the Federal Rules of Criminal Procedure.[4]

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[4] The great majority of courts of appeals that have addressed *Gaudin*-type challenges to convictions have determined that plain-error review under Rule 52(b) is the appropriate standard for reviewing a *Gaudin* claim when the defendant did not object at trial to the district court's failure to submit the element of materiality to the jury. See, *e.g.*, *United States* v. *Jobe*, 101 F.3d 1046, 1061-1062 (5th Cir. 1996); *United States* v. *McGhee*, 87 F.3d 184, 186, vacated and rehearing en banc granted, 95 F.3d 1335 (6th Cir. 1996); *United States* v. *Baumgardner*, 85 F.3d 1305, 1308 (8th Cir. 1996); *United States* v. *David*, 83 F.3d 638, 641 (4th Cir. 1996); *United States* v. *Randazzo*, 80 F.3d 623, 631 & n.4 (1st Cir. 1996); *United States* v. *Ross*, 77 F.3d 1525, 1540-1541 (7th Cir. 1996); *United States* v. *Kramer*, 73 F.3d 1067, 1074 (11th Cir.), cert. denied, 117 S. Ct. 516 (1996); see also *United States* v. *Retos*, 25 F.3d 1220, 1228 (3d Cir. 1994); *United States* v. *Jones*, 21 F.3d 165, 172-173 (7th Cir. 1994); cf. *United States* v. *Ballistrea*, 101 F.3d 827, 835 (2d Cir. 1996) (Rule 52(b) is sole source of appellate jurisdiction, but burden shifts to government to show that defendant's substantial rights were not affected by error). Only the Ninth and Tenth Circuits have deemed plain-error analysis inapplicable in those circumstances. See *United States* v. *Wiles*, Nos. 94-1592 & 95-1022, 1996 WL 707539, at *16 (10th Cir. Dec. 10, 1996) (to be reported at 102 F.3d 1043) (*Gaudin* errors are "structural" and "not amenable to analysis under Fed.R.Crim.P. 52"); *United States* v. *Keys*, 95 F.3d 874, 879 (9th Cir. 1996) (en banc) ("[W]e review under these special circumstances not for plain error, but only for error under Rule 52(a)."), petition for cert. pending, No. 96-1089 (filed Jan. 9, 1997); cf. *United States* v. *Washington*, 12 F.3d 1128, 1138-1139 (D.C. Cir.) (adopting "supervening decision" doctrine, permitting review outside

Those Rules impose both a specific and a general contemporaneous-objection requirement on any defendant who seeks to preserve a challenge to the district court's submission of a case to the jury. Rule 30 provides that "[n]o party may assign as error any portion of the [jury] charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict." Rule 51 provides, more generally, that, to preserve an objection, a party must "make[] known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor." By disregarding those procedural requirements, petitioner forfeited her *Gaudin* claim. See *Olano*, 507 U.S. at 731. And only one provision of federal law entitles petitioner to seek appellate relief despite that forfeiture: Rule 52(b), which specifically governs "errors that were forfeited because not timely raised in district court." *Olano*, 507 U.S. at 731. The "harmless error" standard of Rule 52(a) is unavailable because, as this Court has observed, that provision "governs nonforfeited errors." *Ibid.* Federal courts, moreover, have no residual "supervisory power" to fashion "rules that circumvent or conflict with the Federal Rules of Criminal Procedure." *Carlisle* v. *United States*, 116 S. Ct. 1460, 1466 (1996); *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-255 (1988) (courts may not circumvent harmless-error inquiry required by Rule 52(a)). Courts therefore have no source of authority to "disregard the

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confines of Rule 52(b) where law was settled at time of trial (such that objection would have been futile) but change in governing law occurred by time of appeal), cert. denied, 115 S. Ct. 98 (1994).

Rule[s'] mandate," *id.* at 255, by reviewing forfeited error outside the framework of Rule 52(b).

2. Quite apart from that textual mandate, the purposes underlying the contemporaneous-objection requirement support the same conclusion. As this Court has explained, "[a]ny unwarranted extension" of Rule 52(b)'s narrowly tailored provision for appellate review of forfeited errors "would skew the Rule's 'careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.'" *United States* v. *Young*, 470 U.S. 1, 15 (1985) (quoting *Frady*, 456 U.S. at 163); see also *Levine* v. *United States*, 362 U.S. 610, 619-620 (1960) ("Due regard" for a defendant's constitutional rights "does not require disregard of the solid demands of the fair administration of justice in favor of a party who, at the appropriate time and acting under advice of counsel, saw no disregard of a right, but raises an abstract claim only as an afterthought on appeal."); *Socony-Vacuum*, 310 U.S. at 238-289. Even where circuit precedent arguably compels a trial procedure that other circuits have found unconstitutional, see Pet. Br. 6-7, consistent adherence to the contemporaneous-objection rule remains necessary to ensure the integrity of the trial process. A timely objection is necessary to give the district court an opportunity, in the first instance, to consider the continued validity of existing circuit law and its applicability to the facts of a given case. Moreover, with respect to some categories of error, a timely objection is also necessary to alert the court to any need to supplement the record to accommodate a potential change in controlling law on appeal.

Petitioner's proposed exception to the textually mandated scope of Rule 52(b)—for cases presenting a "solid wall" of unfavorable authority (see Pet. Br. 25)—would mire the courts of appeals in indeterminate inquiries into the "solid[ity]" of the legal precedent that, at the time of trial, supposedly foreclosed a defendant's claim. This case is itself an example of that indeterminacy. Nearly six months before petitioner's trial, the en banc Ninth Circuit recognized the very *Gaudin* right, for prosecutions brought under 18 U.S.C. 1001, that petitioner asserts here. See *United States* v. *Gaudin*, 28 F.3d 943 (9th Cir. 1994) (en banc), aff'd, 115 S. Ct. 2310 (1995). The foundation for that holding was this Court's decision in *In re Winship*, 397 U.S. 358 (1970), as applied in cases through *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). Petitioner does not explain why she could not have raised at trial a legal claim that was then the subject of a circuit split and a pending petition for a writ of certiorari that the United States had filed in this Court.[5]

Petitioner further argues (see Br. 37-39) that uniform application of the contemporaneous-objection requirement would prolong trials by giving defense lawyers an incentive to make frivolous legal objections that they would not otherwise make. That concern, for which petitioner offers no empirical support, is without substance. The class of legal claims

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[5] Petitioner suggests (Br. 28) that Rule 51 exempts her from the contemporaneous-objection requirement because she had "no opportunity" to object to the *Gaudin* error in this case. See Fed. R. Crim. P. 51 ("[I]f a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice that party."). That is incorrect. Petitioner had every opportunity to ask the district court to submit the materiality issue to the jury; she simply elected not to do so.

at issue—claims that are contrary to precedent at the time of trial but that might plausibly benefit from a change in law by the time of appeal—is quite small, and the time required to assert such claims at trial is inconsequential. In this case, for example, if petitioner had seen any potential value in having the jury consider materiality, she could have alerted the district court to her *Gaudin* claim in a matter of seconds. Of course, if petitioner is correct, and if consistent enforcement of the contemporaneous-objection rule does lead to excessive, frivolous objections, the appropriate course is to amend the Federal Rules of Criminal Procedure, not to carve out ad hoc exceptions to those Rules as they are now written.

3. Petitioner also suggests (Br. 19, 31) that her *Gaudin* claim is "structural," such that it falls entirely outside the confines of Rule 52 and requires reversal in every case in which it occurs. That is incorrect. Even if *Gaudin* error belonged to the small class of errors that this Court has described as "structural," which it does not, see pp. 26-29, *infra*, structural errors are not exempt from analysis under Rule 52(b). See *Waldemer* v. *United States*, No. 96-1119 (7th Cir. Jan. 16, 1997) (order amending prior opinion at 98 F.3d 306) (characterizing *Gaudin* error as "structural," but reaffirming its authority to "use[] the discretion afforded us on plain error review to affirm the conviction"); see also *United States* v. *Lopez*, 71 F.3d 954, 960 (1st Cir. 1995) ("The mix of considerations is very different where the trial judge has not been alerted by an objection. Indeed, the [materiality] element may be one that the defendant has chosen not to contest."), cert. denied, 116 S. Ct. 2529 (1996), cert. dismissed, 117 S. Ct. 38 (1996).

A "structural" error is distinguished by the absence of any need to inquire into the possibility of harmlessness when a properly preserved claim of such error is raised on appeal. See, *e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993); *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984). This Court has never held, however, that claims of structural error are immune from generally applicable rules of procedural default. To the contrary, the Court has relied on a defendant's non-compliance with the contemporaneous-objection requirement as the basis for denying appellate relief in a context where, if the defendant had made a timely objection, the error would have required automatic reversal. Compare *Vasquez* v. *Hillery*, 474 U.S. 254, 263-264 (1986) (claim of racial discrimination in the selection of the grand jury can never be harmless error), with *Davis* v. *United States*, 411 U.S. 233, 241-242 (1973) (under Fed. R. Crim. P. 12(b)(2), such a claim is generally barred if not properly raised at trial). Here, Rule 52(b) prescribes the exclusive source of appellate authority for reviewing claims of forfeited error. As the Court explained in *Olano*, that Rule, which "governs on appeal from criminal proceedings, provides a court of appeals a *limited* power to correct errors that were forfeited because not timely raised in district court." 507 U.S. at 731 (emphasis added). Courts and criminal defendants may not short-circuit the limitations of Rule 52(b) by characterizing an error as "structural." Cf. *Carlisle*, 116 S. Ct. at 1466.

II. THE *GAUDIN* ERROR AT PETITIONER'S TRIAL DOES NOT WARRANT REVERSAL UNDER RULE 52(b)

As this Court explained in *Olano*, the plain-error rule entitles a defendant to relief only if the defendant can make four distinct showings. The defendant must establish that the district court committed (1) an "error" (2) that was "plain," "clear," or "obvious" and (3) that affected his "substantial rights." *Olano*, 507 U.S. at 732-735. Even when those showings are made, however, "Rule 52(b) is permissive, not mandatory." *Id.* at 735. A reviewing court may exercise its "discretion" to reverse a conviction for plain error only "if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 736 (quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)); see also *Young*, 470 U.S. at 15 (reversal warranted under plain-error rule "in those circumstances in which a miscarriage of justice would otherwise result") (quoting *Frady*, 456 U.S. at 163 n.14). Petitioner's *Gaudin* claim does not satisfy those standards because it was not "plain" within the meaning of Rule 52(b) and, in any event, because it did not "seriously affect[] the fairness, integrity or public reputation of judicial proceedings."

A. The *Gaudin* Error At Petitioner's Trial Was Not "Plain" Within The Meaning Of Rule 52(b)

1. In identifying the errors that are "plain" ("or, equivalently, 'obvious'") for purposes of Rule 52(b), this Court has not addressed "the special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." *Olano*, 507 U.S. at 734. In one key respect,

this case resembles that "special case": the law governing disposition of the materiality element in perjury trials was "clarified" (by *Gaudin*) during the pendency of petitioner's appeal. In contrast, at the time of petitioner's trial, the governing circuit law was not "unclear": it straightforwardly treated materiality as a matter for the district court, rather than the jury, to decide. See *United States* v. *Molinares*, 700 F.2d 647, 653 (11th Cir. 1983) (materiality under 18 U.S.C. 1623 is a question of law); *United States* v. *Damato*, 554 F.2d 1371, 1373 (5th Cir. 1977) ("The trial court should embody its finding on materiality in an instruction to the jury."). Thus, although that approach was already contrary to the law of another circuit, see *United States* v. *Gaudin*, 28 F.3d 943 (9th Cir. 1994) (en banc), aff'd, 115 S. Ct. 2310 (1995), it did not have the character of error at all in the Eleventh Circuit, let alone "plain" error, until this Court decided *Gaudin*.

In those circumstances, reversing a defendant's conviction in the absence of a contemporaneous objection would be inconsistent with the language and purposes of Rule 52(b). That Rule provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. R. Crim. P. 52(b). By its terms, Rule 52(b) therefore specifies two different times at which a "plain error" might be identified: first, at trial, where the error could have been (but was not) "brought to the attention of the court," and, second, on appeal, where the error might nonetheless be "noticed." In each case, the subject that is either "brought to the [court's] attention" (at the time of trial) or "noticed" (at the time of appeal) is identical: it is "plain error." Put another way, an error cannot

be "noticed" under Rule 52(b) unless it had the same character at trial that it has on appeal: it must have been as "plain" then as now.

Petitioner's contrary interpretation would permit reversal where what should have been "brought to the attention of the [district] court" was not "plain error" at all, as Rule 52(b) requires, but debatable error. That kind of error, however, does not warrant reversal in the absence of a timely objection. See Fed. R. Crim. P. 52(a); cf. *Gaudin*, 115 S. Ct. at 2322 (Rehnquist, C.J., concurring) ("it is certainly subject to dispute whether the error in this case was 'clear under current law,'" a precondition to relief under Rule 52(b)) (quoting *Olano*, 507 U.S. at 734).

For another reason as well, the text of Rule 52(b) requires limiting plain-error relief to errors that are plain at the time of both trial and appeal. The need to enforce the contemporaneous-objection rule is at its zenith in the "special case" identified in *Olano*: where the governing law is simply unclear at the time of trial. See 507 U.S. at 734. In that circumstance, because a district court has an exceptional interest in addressing unclear issues of law in the first instance, the "special case" is the most obvious circumstance in which a defendant's failure to alert the district court to his legal claim should foreclose relief under Rule 52(b). See *United States* v. *Turman*, No. 94-50305, 1997 WL 14791, at *4 (9th Cir. Jan. 17, 1997) ("[A]n error is not plain unless it would have been obvious to a reasonably competent district judge at the time of trial."); *United States* v. *David*, 83 F.3d 638, 643 (4th Cir. 1996) ("[A]s we understand the special case, it is precisely the circumstance where it is most obvious that review should not be authorized.").

Petitioner's position would require the courts of appeals to draw an amorphous distinction between the "special case" and the other class of cases in which an error becomes "plain" only on appeal: cases, such as this one, in which the district court action later challenged as error was, at the time of trial, compelled (rather than merely suggested or allowed) by circuit precedent. See *Turman*, 1997 WL 14791, at *2-*4 (appellate review is unavailable in "special case" but available where objection would have confronted a "solid wall" of contrary circuit authority); *David*, 83 F.3d at 644-646 (similar). But nothing in the text of Rule 52(b) contemplates or permits any such distinction: an error is either "plain" (because it is clearly barred by controlling law) or it is not. It is more faithful to the text of Rule 52(b), and simpler for the courts of appeals, to obviate that distinction altogether by treating alike all cases in which an error was not "plain" at the time of trial.[6]

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[6] The Ninth Circuit held in *Keys* that it would review *Gaudin* claims not raised at trial for harmless error under Rule 52(a) rather than for plain error under Rule 52(b). The court reasoned that the failure to object was excused because, "[s]ince 1970, we have advised criminal defense counsel in this circuit that when faced with a 'solid wall of circuit authority' endorsing a jury instruction, no objection to that instruction need be registered in the trial court to preserve the point on appeal should that 'solid wall' suddenly crumble in the interim and render the instruction defective." 95 F.3d at 878. The Ninth Circuit, however, has no power to advise defense counsel to disregard the contemporaneous-objection requirement of Federal Rules of Criminal Procedure 30 and 51. See *Carlisle*, 116 S. Ct. at 1466. In any event, the Ninth Circuit's approach would not help petitioner, who can point to no similar doctrine in the Eleventh Circuit.

2. Quite apart from those textual considerations, confining the remedial scope of Rule 52(b) to errors that were plain at the time of trial comports with the narrowly defined purposes of the Rule. In *United States* v. *Frady*, 456 U.S. 152 (1982), this Court observed, in dictum, that "recourse may be had to [Rule 52(b)] only on appeal from a trial infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *Id.* at 163. That approach, which by definition forecloses application of plain-error relief where an error becomes "plain" only at the time of appeal, makes abundant sense. Rule 52(b) is designed to protect defendants only against "particularly egregious errors." *Young*, 470 U.S. at 15 (quoting *Frady*, 456 U.S. at 163); see also *Wiborg* v. *United States*, 163 U.S. 632, 658 (1896). At this stage in the development of American law, that characterization does not readily describe trial procedures, such as the one at issue here, that are endorsed by a majority of federal circuits at the time of a defendant's trial. See *Gaudin*, 28 F.3d at 955 (Kozinski, J., dissenting) (citing pre-*Gaudin* cases holding that materiality is an issue of law for the trial judge). And that characterization is an especially inapt description of a practice that traces its roots to a decision of this Court that had endured for more than 60 years by the time of trial. See *Sinclair* v. *United States*, 279 U.S. 263 (1929) (holding that a question's "pertinen[cy]" to a matter under congressional inquiry, 2 U.S.C. 192, was an issue of law for the court), overruled by *Gaudin*, 115 S. Ct. at 2318-2319.

There is nothing unfair about limiting the remedial scope of Rule 52(b) to errors that were plain at the time of trial. If petitioner's trial had taken place one

year earlier, and if her conviction had become final before this Court decided *Gaudin*, she would almost certainly have been barred from invoking the new constitutional rule announced in *Gaudin* as a basis for collateral relief. See *Teague* v. *Lane*, 489 U.S. 288 (1989) (a "new rule" may not generally be asserted on collateral review); *Butler* v. *McKellar*, 494 U.S. 407, 412 (1990) (a holding that overrules a precedent of this Court is "obviously" a new rule under *Teague*).[7] Under *Teague*, innumerable petitioners for post-conviction relief whose perjury convictions became final before *Gaudin* will not benefit from *Gaudin*'s

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[7] *Teague* does not bar the assertion of a new rule that "places a class of private conduct beyond the power of the State to proscribe," or that constitutes a "watershed rule[] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Gray* v. *Netherland*, 116 S. Ct. 2074, 2084 (1996) (internal quotation marks omitted); *Teague*, 489 U.S. at 311 (plurality opinion). The rule announced in *Gaudin*, however, does not qualify for either exception. *Gaudin* did not place any private conduct beyond the government's reach. Nor did its reevaluation of whether judge or jury should determine materiality meet the two-part test for "watershed" new rules, under which the rule must not only significantly improve the "accuracy" of the trial, but also "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Sawyer* v. *Smith*, 497 U.S. 227, 242 (1990) (internal quotation marks and emphasis omitted). The benchmark for any such "watershed" rule is the right to counsel in felony cases. See *Saffle* v. *Parks*, 494 U.S. 484, 495 (1990) ("[W]e have usually cited *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), holding that a defendant has the right to be represented by counsel in all criminal trials for serious offenses, to illustrate the type of rule coming within the exception."). As the plurality in *Teague* observed, it is "unlikely that many such components of basic due process have yet to emerge." 489 U.S. at 313.

new constitutional rule. Petitioner has no special claim to more favorable treatment.

Petitioner contends (Pet. Br. 25-26), that the retroactivity principle of *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), bars the application of plain-error review under Rule 52(b) in this case. That is incorrect. *Griffith* holds that a ruling of this Court applies to all criminal cases that are not final at the time the ruling is announced, whether or not the decision makes a "clear break" with prior law. *Id.* at 328. Accordingly, *Griffith* entitles petitioner to rely on *Gaudin* (which was decided before petitioner's conviction became final) in arguing that withholding the materiality determination from the jury constituted "error." Nothing in *Griffith*, however, suggests that a defendant who has *forfeited* a constitutional claim is excused, once favorable new precedent appears, from satisfying the remaining three components of the plain-error test. See *Olano*, 507 U.S. at 731. The petitioners in *Griffith* had each objected at trial on the same fundamental grounds that they later cited on appeal, with the aid of favorable intervening Supreme Court precedent, as a basis for reversal. See 479 U.S. at 317, 319. By permitting the defendants in *Griffith* to rely on the intervening case won by another defendant, *Griffith* served the goal of "treating similarly situated defendants the same." *Id.* at 327. A defendant who objects at trial, however, is not "similarly situated" in all respects to a defendant, such as petitioner, who did not. Plain-error review applies to the latter class of defendants because the judicial system has a strong interest in "encourag[ing] all trial participants to seek a fair and accurate trial the first time around." *Young*, 470 U.S. at 15 (quoting *Frady*, 456 U.S. at 163).

B. The *Gaudin* Error At Petitioner's Trial Does Not Satisfy The Requirements For Discretionary Relief Under Rule 52(b)

Even if Rule 52(b) could be construed to permit appellate relief in some cases when an error becomes plain only after the time of trial, the Rule requires two additional showings before a court may reverse a conviction. Not only must petitioner show that the error affected her "substantial rights," but also, under the "discretionary" component of the plain-error inquiry, the error must "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736. In this case, it is unnecessary to decide whether the *Gaudin* error affected petitioner's substantial rights. Even if it did, relief would be clearly unwarranted under the discretionary prong of Rule 52(b). Petitioner does not and cannot demonstrate any reasonable probability that a trial without the *Gaudin* error would result in a different outcome. And the error at issue—which conformed to nearly universal practice at the time of trial and which enjoyed the approval of courts throughout the nation, including the highest court in the land—does not independently require relief despite its unimportance to the outcome. To grant relief in this case would therefore detract from, rather than enhance, "the fairness, integrity [and] public reputation of judicial proceedings." *Olano*, 507 U.S. at 736.

1. Petitioner focuses much of her argument on the "substantial rights" component of the plain-error inquiry.[8] In so doing, she articulates no basis for con-

[8] The inquiry into whether an error affects "substantial rights" is common to both the harmless-error and plain-error

testing the district court's materiality determination and no reason for believing that a properly instructed jury would have reached a different determination. Instead, she argues that the error here is "structural," and that structural errors automatically violate a defendant's "substantial rights" whether or not they cause demonstrable prejudice. See, *e.g.*, Pet. Br. 21-22, 35-36. Even if petitioner were correct in classifying *Gaudin* error as "structural," it would not assist her here; a reviewing court must still address the scope of its "remedial discretion" under *Olano*, 507 U.S. at 736, and petitioner's claim does not satisfy the standards governing the exercise of that discretion. But petitioner is in any event incorrect in labeling *Gaudin* error as "structural."

This Court has emphasized that, in any criminal prosecution, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis." *Rose* v. *Clark*, 478 U.S. 570, 579 (1986). Accordingly, the Court has found that "most constitutional errors can be harmless." *Arizona* v. *Fulminante*, 499 U.S. 279, 307 (1991). In *Fulminante*, this Court distinguished "structural defects in the constitution of the trial mechanism," which generally affect both "[t]he entire conduct of the trial from beginning to end" and "the framework within which the trial proceeds,"

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rules. See Fed. R. Crim. P. 52(a) ("Any error * * * which does not affect substantial rights shall be disregarded."). The plain-error rule, Rule 52(b), "normally requires the same kind of [substantial rights] inquiry [as Rule 52(a)], with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Olano*, 507 U.S. at 734.

from "error[s] in the trial process itself." *Id.* at 309-310. Structural error is characterized by an overarching defect that forecloses harmless-error review. This Court has recognized only a handful of errors as structural. See *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction); *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (racial discrimination in grand jury); *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984) (denial of public trial); *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984) (denial of self-representation); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (total denial of counsel); *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (biased judge). "Trial errors," in contrast, are amenable to harmless-error review. *Fulminante*, 499 U.S. at 306-308 (collecting cases).

The Court has held that many errors in jury instructions involving a single element of an offense are trial errors, subject to harmless-error analysis. See *Yates* v. *Evatt*, 500 U.S. 391, 404 (1991) (erroneous rebuttable presumption); *Rose* v. *Clark*, 478 U.S. at 580 (same); *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam) (erroneous conclusive presumption); *Pope* v. *Illinois*, 481 U.S. 497, 503 (1987) (unconstitutional misdescription of element of offense). For example, where a jury is erroneously instructed to presume an ultimate fact from predicate facts, the error is nonetheless harmless if "no rational jury could find those [predicate] facts without also finding that ultimate fact," because, in that context, "making those findings is functionally equivalent to finding the element required to be presumed." *Sullivan*, 508 U.S. at 281; *Carella*, 491 U.S. at 266. That determination may be made when an element has been entirely omitted, just as it may be made when the element has been misdescribed. See *California* v. *Roy*, 117 S. Ct.

337, 339 (1996) (per curiam) ("[A]n error in the instruction that defined the crime * * * is * * * as easily characterized as a 'misdescription of an element' of the crime, as it is characterized as an error of 'omission.'"). In either case, such an error is, by definition, not "of the structural sort that def[ies] analysis by harmless error standards." *Ibid.* (internal quotation marks omitted).

For that reason, *Gaudin* error is not properly characterized as "structural." A *Gaudin* error removes only one element (materiality) from the jury's consideration; the jury must otherwise consider the evidence and determine, beyond a reasonable doubt, whether the defendant "knowingly" made a "false" statement under "oath." 18 U.S.C. 1623(a). Thus, a *Gaudin* error would be deemed harmless when a jury's findings on the other elements of an offense embrace facts that no rational juror could have found without finding the functional equivalent of materiality. See *United States* v. *McGhee*, 87 F.3d 184, 187-188 (noting that, in light of "predicate facts" that jury had to find to infer knowing false statements, *Gaudin* error was harmless under *Rose* v. *Clark*, *supra*), vacated and rehearing en banc granted, 95 F.3d 1335 (6th Cir. 1996). *Gaudin* error might also be harmless where, at trial, a defendant conceded the materiality of his statements. See *Carella*, 491 U.S. at 270 (Scalia, J., concurring in the judgment); cf. *United States* v. *Rogers*, 94 F.3d 1519, 1526-1527 (11th Cir. 1996) (omission of knowledge element in prosecution under 26 U.S.C. 5861(i) harmless when defendant admitted knowledge). And the error would be harmless if the jury found the element in question in returning a verdict on a different but factually related count. Accordingly, as Amicus National Association

of Criminal Defense Lawyers (NACDL) recognizes, because errors in the category to which *Gaudin* error belongs "can be harmless in one of these special circumstances, it would not be appropriate to classify the broad category of [such] errors as 'structural' errors." NACDL Br. 22.[9]

Because petitioner's characterization of *Gaudin* error as "structural" is incorrect, she must demonstrate actual prejudice to establish that the *Gaudin* error at her trial affected her "substantial rights." The court of appeals held that she could not make that showing because the evidence of materiality was "overwhelming." J.A. 88. This Court need not decide whether overwhelming evidence of materiality may demonstrate that a *Gaudin* error did not affect a defendant's "substantial rights,"[10] however, because

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[9] The NACDL argues (Br. 22) that it would be appropriate to label the subcategory of such errors that *are* harmful as "structural." The term "structural error," however, defines a class of errors to which harmless-error analysis is inapplicable. See *California* v. *Roy*, 117 S. Ct. at 339; *Sullivan*, 508 U.S. at 281-282. That phrase does not apply to errors that a reviewing court deems harmful after conducting harmless-error analysis.

[10] Compare *Pope* v. *Illinois*, 481 U.S. at 503 ("[I]f a reviewing court concludes that no rational juror, if properly instructed, could find value in the magazines, the convictions should stand."), with, *e.g.*, *Sullivan*, 508 U.S. at 280 (erroneous "reasonable doubt" instruction invalidates conviction on harmless-error review where "[t]he most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt"); *Yates* v. *Evatt*, 500 U.S. at 404 ("[T]he issue under *Chapman* [v. *California*, 386 U.S. 18 (1967)] is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt."); *California* v. *Roy*, 117 S. Ct. at 339 (Scalia, J., joined by Ginsburg, J., concurring) ("The absence of a formal verdict on this point cannot be rendered harmless by the fact that, given the

that issue is ultimately irrelevant to the outcome of this case.

By its terms, "Rule 52(b) is permissive, not mandatory," and "the standard that should guide the exercise of remedial discretion under Rule 52(b)" is whether an error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Olano*, 507 U.S. at 735-736 (quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)). As this Court made clear in *Olano*, "a plain error affecting substantial rights does not, without more, satisfy [that] standard, for otherwise the discretion afforded by Rule 52(b) would be illusory." 507 U.S. at 737. As discussed below, whether or not the *Gaudin* error here affected petitioner's "substantial rights," concern for "the fairness, integrity [and] public reputation of judicial proceedings" requires affirmance, not reversal, of her conviction.[11]

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evidence, no reasonable jury would have found otherwise."). Cf. *Olano*, 507 U.S. at 734 (on plain-error review, but not on harmless-error review, defendant bears burden of establishing violation of substantial rights).

[11] The majority of courts of appeals that have addressed challenges to *Gaudin*-type errors under Rule 52(b) have affirmed convictions under the fourth, discretionary prong of the *Olano* analysis where the evidence of materiality at trial was clear and overwhelming, as in this case. See *Jobe*, 101 F.3d at 1062-1063 (upholding conviction on plain-error review despite *Gaudin*-type error); *McGhee*, 87 F.3d at 186-188 (same); *Randazzo*, 80 F.3d at 632 (same); *Ross*, 77 F.3d at 1540-1541 (same); *United States* v. *Allen*, 76 F.3d 1348, 1368 (5th Cir.), cert. denied, 117 S. Ct. 121 (1996); see also *Baumgardner*, 85 F.3d at 1310 (reversing conviction on plain-error review where "the evidence of materiality was slim"); *David*, 83 F.3d at 647-648 (reversing conviction because, among other considerations,

2. The evidence of materiality at petitioner's trial was overwhelming, uncontroverted, and incontrovertible. The grand jury that had been investigating Earl Fields was the same grand jury that indicted petitioner for giving false testimony material to that very investigation. J.A. 5-6, 12, 60, 65-66. At trial, both the grand jury foreman (J.A. 61-62) and a federal agent involved in the Fields investigation (J.A. 59-60) confirmed that the grand jury had in fact been investigating Fields' drug trafficking and money laundering activities. Petitioner has never disputed that fact. Moreover, the subject matter of petitioner's testimony (the source of money for her home improvements) was self-evidently material to that investigation. The grand jury asked petitioner about that money to find out whether Fields—the father of one of petitioner's children, see J.A. 39—had hidden his drug proceeds in her real estate holdings. See J.A. 65-66. As the district court correctly determined, petitioner's false answers to that inquiry plainly had "a natural tendency to influence, or [were] capable of influencing," *Gaudin*, 115 S. Ct. at 2313, the course of the grand jury's investigation.[12]

"a jury could conceivably have concluded * * * that materiality was not ultimately proven").

[12] Petitioner contends (see Br. 32) that the district court applied something less than the beyond-a-reasonable-doubt standard in making its materiality determination. There was no hint of uncertainty in the district court's conclusion, however. The court found that the subject matter of petitioner's false testimony "would be within the purview of information that the grand jury may have been looking at in order to continue their investigation or conduct their investigation on Mr. Fields." J.A. 66. The court's use of the term "may" does not indicate a relaxed standard of proof; it merely restates the

Petitioner has never developed any theory, much less presented any evidence of her own, to contest the materiality of her false statements. At trial, petitioner limited her materiality defense to a perfunctory, one-sentence assertion that "the element of materiality has been insufficiently proven," such that "the Court ought to grant a judgment of acquittal." 2A Tr. 109. But petitioner offered no evidence and no argument to support that position. Nor did petitioner seek evidentiary development on the materiality point; to the contrary, she sought to exclude relevant materiality evidence at trial on the ground that it was "an improper matter for the jury." J.A. 61. Trial tactics may well have dictated that strategy, for no rational factfinder could question the materiality of her false testimony to the grand jury's investigation.[13]

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definition of materiality (quoted in the text), which is satisfied whenever the information at issue would naturally bear on the decisionmaker's decision. The district court expressed no doubt that petitioner's false grand jury testimony met that standard. See J.A. 65-66.

[13] Petitioner suggests (Br. 27, 39-40) that, quite apart from the court's erroneous failure to submit the materiality issue to the jury, the district court may have tainted the jury deliberations on the other elements of the offense by instructing the jury that "the questions asked the defendant, as alleged, constituted material matters in the grand jury proceedings referred to in the indictment." J.A. 72. That contention is without substance. Petitioner suggests no way in which the relevant sentence in the instructions—which petitioner herself proposed (J.A. 69-70)—could have influenced the jury's consideration of the non-materiality elements. Indeed, the trial court instructed the jury that "[y]ou must make your decision only on the basis of the testimony and other evidence presented here during the trial," 3 Tr. 128; see also *id.* at 134 ("you are here to

Petitioner therefore has not shown, and could not show, any "reasonable probability" that the jury, if properly instructed, would have found her statements immaterial; the *Gaudin* error therefore does not "undermine[] confidence in the outcome of the trial." *Kyles* v. *Whitley*, 115 S. Ct. 1555, 1565-1566 (1995) (under "reasonable probability" test of *United States* v. *Bagley*, 473 U.S. 667, 678 (1985), "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence"). In those circumstances, reversing a conviction for *Gaudin* error would impair, not promote, "the fairness, integrity [and] public reputation of judicial proceedings." *Olano*, 507 U.S. at 736. "What really hurts the 'reputation of judicial proceedings' is vacating a criminal conviction because of what laymen properly call a 'technicality,' that is, a technical defect which made no practical difference in the particular case." *United States* v. *Keys*, 95 F.3d 874, 883 (9th Cir. 1996) (Kleinfeld, J., dissenting), petition for cert. pending, No. 96-1089 (filed Jan. 9, 1997).

"[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986). Concern for the "fairness" and "integrity" of judicial proceedings, therefore, supports upholding the convictions of those who are indisputably guilty,

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determine from the evidence in this case whether the defendant is guilty or not guilty"), and the materiality instruction itself was not "evidence." Moreover, the court explicitly instructed the jury that materiality "is not a matter with which you are concerned." *Id.* at 132.

who received fair judicial treatment under the prevailing practice at the time of trial, and who saw no reason to challenge that practice. It does not support reversing scores of convictions on forfeited legal grounds that had no bearing on the ultimate determination of guilt or innocence. Whether or not overwhelming evidence of guilt is sufficient to hold that an error did not affect a defendant's "substantial rights," see J.A. 87-88, such evidence is quite relevant, under well-accepted remedial principles, to the availability of discretionary relief for a defaulted claim of constitutional error. Cf. *Schlup* v. *Delo*, 115 S. Ct. 851, 867 (1995).

3. Because petitioner cannot plausibly claim that any jury would have found her false statements to have been immaterial, she relies on a passage in *Olano* leaving open the possibility that "[t]here may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome." 507 U.S. at 735. The possibility of that "special category" follows from this Court's observation that "[a]n error may 'seriously affect the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.* at 736-737.

A trial court's failure to submit the materiality element to the jury in a trial preceding *Gaudin* does not fit within that "special category" of forfeited errors that may warrant reversal regardless of the defendant's guilt. As petitioner acknowledges (Br. 26), the district court followed "almost fifty-five years" of circuit practice in deciding the materiality issue itself rather than submitting it to the jury. At the time of petitioner's trial, the great majority of federal circuits—by a margin of eleven to one—had embraced that approach as the proper method of

adjudicating the materiality question when it is an element of an offense. See *United States* v. *Gaudin*, 28 F.3d 943, 955-958 (9th Cir. 1994) (Kozinski, J., dissenting) (citing cases), aff'd, 115 S. Ct. 2310 (1995). Indeed, the lower courts applied that rule in reliance on a 1929 decision of this Court, see *Sinclair* v. *United States*, *supra*, that was cited with approval (for another purpose) as recently as 1988. See *Kungys* v. *United States*, 485 U.S. 759, 772 (1988) (" '[T]he materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court.' ") (quoting *Sinclair*, 279 U.S. at 298).

Against that background, the practice of having the court resolve the issue of materiality, although erroneous in hindsight, is not so "egregious," *Young*, 470 U.S. at 15, as to threaten the "fairness," "integrity," or "public reputation" of all judicial proceedings in which the error occurred. *Olano*, 507 U.S. at 736. Between 1929 and 1995, thousands of perjury and false statement convictions were obtained in trials in which the judge, rather than the jury, decided the materiality element. It is implausible to suggest, as petitioner does, that those convictions were all fundamentally unfair. In a case like this—in which the defendant did not seek a jury determination at trial and has never developed any defense, let alone a colorable defense, on the materiality issue—a *Gaudin* error does not warrant the exercise of appellate remedial discretion. To reverse a conviction in these circumstances would undermine society's reliance interest in the stability of criminal convictions and would impair the very "public reputation of judicial proceedings" that *Olano* directs courts to protect. *Ibid.*

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 1623 provides:

§ 1623. False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

2. Rule 30 of the Federal Rules of Criminal Procedure provides:

Rule 30. Instructions

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

3. Rule 51 of the Federal Rules of Criminal Procedure provides:

Rule 51. Exceptions Unnecessary

Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party's objection to the

action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice that party.

4. Rule 52 of the Federal Rules of Criminal Procedure provides:

Rule 52. Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.